

A Lawyer's Covert "Friending" of a Witness on MySpace and Facebook is Addressed by the Philadelphia Bar Association's Professional Guidance Committee

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In its advisory Opinion 2009-02, the Philadelphia Bar Association's Professional Guidance Committee responded to an attorney's inquiry regarding whether covert "friending" of a witness would be a violation of the Pennsylvania Rules of Professional Conduct. Specifically, the inquiring attorney had taken the deposition of a non-party witness. During that deposition, he learned that the witness maintained MySpace and Facebook pages. Following the deposition, the attorney attempted to access the witness's pages, but learned that she limits access to only those persons to whom she grants "friend" status. The inquiring attorney's proposed course of conduct was to have a third party, whose name the witness would not recognize, request to become her "friend," thereby potentially gaining access to the webpages and thereafter sharing the information learned from the pages with the inquiring attorney.

The Committee determined that the proposed course of conduct would be a violation of Rule 8.4, relating to professional misconduct, and Rule 4.1, relating to truthfulness. First, the Committee noted that "[t]he fact that the actual interaction with the witness would be undertaken by a third party who, the Committee assumes, is not a lawyer does not insulate the inquirer from ethical responsibility for the conduct."

The Committee went on to conclude that "the proposed course of conduct... would violate Rule 8.4(c) because the planned communication by the third party with the witness is deceptive. It omits a highly material fact, namely, that the third party who asks to be allowed access to the witness's pages is doing so only because he or she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness." The Committee also clarified that whether the witness freely grants "friend" status to anyone who asks is irrelevant, stating "[e]ven if, by allowing virtually all would-be 'friends' onto her Facebook and MySpace pages, the witness is exposing herself to risks like that in this case, excusing the deceit on that basis would be improper." Finally, the Committee concluded that the proposed course of conduct would also violate Rule 4.1 because "the proposed conduct constitutes the making of a false statement of material fact to the witness."

The Philadelphia Bar Association's Committee on Professional Guidance advises members of the Philadelphia Bar who inquire regarding the propriety of any action proposed to be taken by them in a professional matter. In its discretion, the Committee may publish its opinions, provided that such published opinions do not contain the names of the persons involved.